STATE OF CALIFORNIA

Energy Resources Conservation And Development Commission

In the Matter of:	)	Docket No. 02-AFC-4
	)	
Application for Certification of the Walnut Energy Center (Turlock Irrigation District)	)	**Staff's Reply Brief**
	)	November 14, 2003

INTRODUCTION

On October 9, 2003, the Committee assigned to review Turlock Irrigation District's (TID's) Application for Certification (AFC) for the Walnut Energy Center closed the evidentiary record for the proceeding and directed parties to file Opening and Reply Briefs, on October 31 and November 14, respectively. There were no active interveners in the proceeding and contested topics were limited to two issues in Air Quality, and one issue each in Compliance and Land Use. Only staff and TID filed Opening Briefs. TID addressed a number of topics in its Opening Brief, including the four contested issues noted above. This is staff's Reply Brief, addressing TID's Opening Brief on those contested topics.

ARGUMENT

I. STAFF RECOMMENDS A LOWER AMMONIA SLIP LEVEL THAN THE DISTRICT *ONLY* BECAUSE THE DISTRICT HAS FAILED TO EVALUATE BOTH THE IMPACT OF AMMONIA SLIP ON SECONDARY PARTICULATES AND THE COST-EFFECTIVENESS OF LOWER LEVELS.

In its Opening Brief, TID urges the Committee to "rely on the judgment" of the San Joaquin Valley Air Pollution Control District (SJVAPCD), rather than the "unsupported and ill-conceived claims" of staff. As stated in our Opening Brief, staff ordinarily *does* support relying on the local district's Determination of Compliance (DOC) in addressing air quality issues. However, that support is

limited *to those issues that the District has addressed*. Where, as here, the DOC does not evaluate certain environmental effects, such reliance would be misguided. Moreover, staff's claims are not "unsupported and ill-conceived"; staff has provided substantial evidence that the higher ammonia slip levels identified in the DOC may contribute to ongoing violations of ambient air quality standards for particulates, and that a lower level is feasible. Given the evidence that the SJVAPCD did not evaluate this impact, the Committee must do so, and if the impact is significant, require appropriate, feasible mitigation.

The record is clear that the SJVAPCD did not evaluate the potential of the project's ammonia slip to contribute to secondary particulates. (10/29/03 RT, p. 41:17-21) In fact, the SJVAPCD witness stated that the 10 ppm level in the DOC is based on the SJVAPCD's risk management threshold for toxics[1] (*Id*. at 42:20-25), not on consideration of secondary particulate formation. When asked at the hearing to explain this point, the SJVAPCD witness opined that controlling NOx is more important than the secondary particulate created as a result of a 10 ppm, rather than a 5 ppm, ammonia slip level. (*Id*. at 41:24-25 – 42:1-2) However, on cross-examination, the witness also conceded that the Commission need not choose between controlling NO_x and ammonia because NO_x emissions can be kept at 2 ppm whether ammonia slip is 5 ppm or 10 ppm. (*Id*. at p. 42:3–11) He also testified that the SJVAPCD had never conducted a cost-effectiveness analysis comparing ammonia slip levels of 5 ppm and 10 ppm. (*Id*. at 43:24-25 – 44:1-2)

Notwithstanding the lack of a SJVAPCD evaluation of the contribution of ammonia slip to secondary particulates, TID claims that the following statement of the SJVAPCD supports its position that decreases in ammonia are unlikely to affect particulate levels:

> We want to ensure that the NO_x limits are met without being unduly prescriptive on other issues where we don't feel that there is that much of an issue. (9/29/03 RT, p. 42:7-11)

[1] Staff concurs that a 10 ppm ammonia slip level does provide adequate protection against toxic effects of the ammonia emissions.

In the first place, as discussed above, the SJVAPCD has never conducted a cost-effectiveness analysis, so any conclusion that a 5 ppm ammonia slip level is "unduly prescriptive" is speculative at best.[2] More importantly, this sentence does not – nor does any other evidence in the record -– support a conclusion that reductions in the project's ammonia emissions will not affect secondary particulates. As staff pointed out in our Opening Brief, even in an ammonia-rich environment, an ammonia slip level of 10 ppm translates into 675 – 1,600 pounds of additional particulate attributable to this project *per day*, which is *two to four times* the project's directly-emitted particulate emissions. (Staff Opening Brief, p 4-5)

Also unsupported is TID's claim that SJVAPCD's conclusion regarding ammonia slip is based on a "case-by-case" determination. TID has not cited – and cannot cite – any evidence that SJVAPCD conducted any analysis of the contribution of ammonia slip from this project to secondary particulates. In fact the SJVAPCD's own testimony is that a 10 ppm limit, "is our District practice and has been for a number of years." (9/29/03RT, p. 42:16-19) That is hardly evidence of a case-by-case determination either for this specific project, or for SCR systems in general.

Moreover, as staff pointed out in our Opening Brief, the sensitivity analysis relied upon by TID's witness as support for the proposition that ammonia reductions will not lead to particulate reductions does not bear out TID's claims. We will not revisit the flaws in the analysis that the SJVAPCD itself identified, but merely note that no conclusion can be drawn from that study. (*See*, Staff Opening Brief, p. 5-6) When this fact is considered in light of the substantial evidence staff presented that ammonia slip in an ammonia-rich environment does contribute to particulate levels that regularly exceed the ambient air quality standards, the Commission's responsibility to evaluate and require mitigation for these significant impacts is clear.

[2] Nor did any party to this proceeding contend that a 5 ppm limit is unduly prescriptive; in fact, no party presented any evidence of any detriment associated with a 5 ppm limit.

Finally, we note that TID cites the SJVAPCD statement in the DOC that "the ammonia/NO_x relationship must be carefully reviewed for any proposed project." (TID Opening Brief, p.12) Staff agrees wholeheartedly with this statement. The record is clear that SJVAPCD never conducted such a review for this project and that the 10 ppm level in the DOC is not based on any consideration of the contribution of ammonia slip from this project to secondary particulates. It therefore falls upon the Commission to conduct this assessment. Where another permitting agency considers some, but not all, environmental effects that a project may create, the Lead Agency must include an evaluation of those unexamined effects in its analysis. Therefore, we recommend that the Committee evaluate this impact that the DOC did not take into account, and determine the need for mitigation. Staff believes that when this analysis is conducted, the need for mitigation is clear. Staff urges the Committee to adopt **AQ-C6**.

II. COMMISSION STAFF HAS CONSISTENTLY RECOMMENDED AN AMMONIA SLIP LEVEL OF 5 PPM FOR PROJECTS THAT ARE LOCATED IN PARTICULATE NON-ATTAINMENT AREAS AND FOR WHICH THE LOCAL DISTRICT HAS NOT EVALUATED THE CONTRIBUTION OF AMMONIA SLIP TO SECONDARY PARTICULATE FORMATION.

TID cites a series of cases in an attempt to argue that staff is inconsistent with respect to its ammonia slip recommendations. As staff testified at hearing, a number of the cases identified by TID are quite old and do not reflect the fact that control measures improve over time. (9/29/03 RT, p. 97:20-25 – 98:1-13) In addition, other cases cited involve simple-cycle projects, which are not comparable to combined-cycle projects. (*Id*. at 96:23-25 – 97:1-7) As Staff pointed out in our Opening Brief, we have recommended a NO_x emission limit of 2 pmm and an ammonia slip level of 5 ppm in 11 of the past 12 licensing proceedings for combined-cycle projects. (Staff Opening Brief, p. 6) The one recent exception represents a staff attempt at a global settlement of air quality issues based on the particular facts of that specific case. (9/29/03, p. 95:18-25) This one exception in twelve cases does not justify accepting unnecessarily high

emission rates that may contribute to ongoing violations in this case. The result of a settlement in one case should not govern what is acceptable in a subsequent case, particularly when the record contains substantial evidence that doing so would leave an unmitigated significant impact unaddressed in the subsequent case.

Whether or not the Commission has decided to allow higher ammonia slip levels in recent cases, we respectfully request that the Committee carefully consider the issue of ammonia slip in light of the record in *this* case. The magnitude of the contribution to secondary particulate violations from higher ammonia slip levels in conjunction with the fact that the SJVAPCD has not evaluated the impact at all makes the Commission's responsibility clear. It must evaluate the effect and require mitigation. We therefore urge the Committee to adopt **AQ-C6**.

III. THE COMMISSION SHOULD NOT ABANDON ITS RESPONSIBILITY TO ENSURE COMPLIANCE WITH FEDERAL LAWS AND SHOULD REQUIRE EPA TO AFFIRM THAT THE OFFETS TID PROPOSES TO USE ARE VALID.

Staff has proposed **AQ-C8** in order to ensure that the offsets proposed by TID meet federal requirements. TID argues that staff's **AQ-C8** represents a "new" requirement that should be rejected because it is an issue that staff, and not EPA, has created. (TID Opening Brief, p. 14-15) TID cites the fact that in its comment letter (Exh. 36), EPA did not mention both of the certificates by number about which it has expressed reservation by number. TID also claims that the EPA comment letter is nothing more than a simple "reminder" that EPA requirements must be satisfied.

Staff will refrain from discussing the lengthy history of EPA concerns with the SJVAPCD that justify such a reminder. Rather, we will simply reiterate EPA's expressed concern that the "pre-baseline" offsets identified in **AQ-C8** may not meet the federal Clean Air Act requirements that such offsets be surplus.[3] (*Id*.)

[3] There is no dispute that the offsets identified in **AQC-8** are pre-baseline offsets.

Staff believes that the most prudent way for the Commission to meet its obligations to ensure that the project complies with federal law is to include a condition of certification requiring a statement from EPA that its concerns about the pre-baseline offsets have been resolved before the offsets are used.

TID argues that a better way to address this concern is to modify **AQ-C8** to require that the EPA notify the TID or the SJVAPCD in writing that the offsets would violate federal law. (TID Opening Brief, p. 16) Such a modification is inappropriate. As part of its normal process of commenting on DOCs, EPA has already expressed its concerns that the offsets may not be surplus. The next step should be resolution of those concerns, not a requirement that EPA reiterate them. By requiring assurance that EPA has concluded that the offsets do, in fact, meet federal requirements, the Commission properly defers to the federal agency that has the authority to confirm the validity of the offsets. Staff's **AQ-C8** would provide assurance that the project, subject to EPA's approval of the proposed offsets, would operate in compliance with federal law. The condition should therefore be adopted.

IV. STAFF'S COM-8 SHOULD BE ADOPTED IN ORDER TO ALLOW THE COMMISSION TO MEET ITS RESPONSIBILITY TO ENSURE THAT FACILITIES IT LICENSES ARE OPERATED IN A WAY THAT PROTECTS PUBLIC HEALTH AND SAFETY.

As pointed out in our Opening Brief, TID's statements about Commission approval authority for security plans have been ambiguous. However, in its Opening Brief, TID makes it clear that it would like the Commission to abandon its responsibility to ensure that the facilities it licenses do not present a risk to public health and safety. TID asserts that if the applicant's proposal for **COM-8** is accepted by the Committee, no dispute resolution mechanism is necessary. (TID Opening Brief, p. 39) As TID's proposed **COM-8** identifies only a review and comment role for staff, the lack of a Commission dispute resolution mechanism would mean that TID is the final arbiter of the adequacy of its security plans. This is unacceptable.

As we stated at the hearings on this topic, the Commission has explicit authority to require a security plan. (Pub. Resources Code, § 25523) It cannot and should not delegate its responsibilities to ensure that Commission-licensed facilities are safe. State agencies cannot legally delegate the responsibilities they have to ensure safe and reliable operation of a powerplant to the entities they license to operate those powerplants. (Govt. Code § 7) The fact that TID may have similar responsibilities under state or federal law for other plants it operates does not relieve the Commission of its responsibilities. The Warren-Alquist Act is clear that *the Commission* is responsible for identifying the requirements a facility must meet to ensure public health and safety.

Thus, it would appear that TID's protestations about a workable dispute resolution (as well as its claims about due confidentiality and conflict of interest concerns) are nothing but a diversionary tactic. In fact, TID does not want *any* dispute resolution mechanism, despite the fact that staff has cited statutory authority that enables the Commission to provide the confidentiality protections TID claims it needs.[4] (Staff Opening Brief, p. 11) Rather, TID wants to exercise exclusive authority over facility security. The Committee should reject TID's attempts to persuade the Committee to abandon its responsibility in this area.

V. TID'S ALLEGATIONS THAT IT HAS THE NECESSARY EXPERTISE IN SAFETY MATTERS AND THAT STAFF LACKS SUCH EXPERTISE ARE COMPLETELY UNSUPPORTED BY THE RECORD.

In its Opening Brief, TID makes the surprising claim that there is no evidence that staff is qualified to review security plans. (TID Opening Brief, p. 33) TID even goes so far as to claim that the public interest may be harmed if the authority to review and approve security plans remains with the Commission. (TID Opening Brief, p. 34) This statement is wholly contradicted by the testimony of staff's witness Dr. Greenberg. Dr. Greenberg has more than two decades of experience in risk assessment, and in the past year has discussed security

[4] Staff also refuted applicant's claims that there are insufficient provisions to protect against disclosure of confidential information and conflict of interest. (Staff Opening Brief, p. 9)

matters with the Central Intelligence Agency, the Office of Homeland Security, the U.S. Coast Guard, the California Office of Emergency Services, and the California National Guard. (10/09/03 RT, p. 65:10-25 – 66:1-14) In addition, he has received extensive training in security matters. (*Ibid*.) In fact, TID's own *voir dire* clearly demonstrates that the staff that will be reviewing security plans have ample training and knowledge regarding security issues. (*See*, 10/09/03 RT, p. 123:23-25 – 126:1-6) We note that the appropriate time to challenge Dr. Greenberg's qualifications was the evidentiary hearing. Having chosen not to do so, TID's unsupported criticisms of his expertise in its brief should be rejected.

Moreover, TID's claim that it has the expertise that it claims staff lacks is equally unsupported. The TID witness has no formal training or education in security matters. (10/09/03 RT, p. 41:4-12) He is responsible for just one gas-fired power plant that uses anhydrous ammonia. (*Id*. at p. 40:14-20) In fact, the *only* reference in his testimony to TID security plans involves hydroelectric facilities, which do not use large quantities of hazardous materials. Ironically, the only technical discussion in TID's brief clearly illustrates the very point staff is trying to make. TID discusses the U.S. Department of Energy Draft Vulnerability Assessment Methodology for Electric Power Infrastructure, dated September 30, 2002 (Exh. 58), and concludes that it supports TID's claim that it should assess its own risk. (TID Opening Brief, p. 38)

However, the document contains more guidance regarding trash and waste handling (two pages), water systems (seven pages), cyber-security (seventeen pages), and the financial impacts of a terrorist attack (fourteen pages) than it does addressing the risk to the public from the off-site consequences of an intentional release of acutely hazardous materials (no pages). In fact, there is only one minor reference to hazardous materials in 155 pages, and that reference is to off-site fire and hazmat emergency response availability.

Staff agrees that the DOE document provides some useful guidance. But, if it were followed to the exclusion of other guidance, the result would be a woefully inadequate vulnerability assessment and power plant security plan. It is a generic document addressing all electric power infrastructure and is not specifically focused on the risks associated with a natural gas power plant at which acutely hazardous materials are stored and used. In fact, the more recent version of the 2002 U.S. Department of Justice Report (identified in staff's proposed **COM-8**, and identified as Exh. 57) is explicitly designed to address risks at facilities which have hazardous chemicals present. Clearly, there is more than one guidance document that can be used in developing and evaluating a facility security plan.

In short, TID's cross-examination about our use of these references raises concerns that TID does not appreciate the specific risks of large gas-fired facilities that use large quantities of hazardous materials. Staff believes that if terrorist actions compromise the integrity of the facility, airborne releases of hazardous chemicals could cause serious injuries and/or fatalities among facility employees, and affect adjoining areas and populations. This is precisely why we recommend that the Commission require approval of security plans at gas-fired power plants in California, including the TID Walnut Energy Center where the storage, use, and transportation of anhydrous ammonia and other hazardous materials will occur.

In conclusion, TID has provided no cogent argument that the Committee should ignore its responsibility to ensure facility security. The Warren-Alquist Act requires the Commission as a matter of law to ensure the safety of facilities it licenses. Moreover, the staff has amply demonstrated that it is qualified to review and approve these plans. Staff's **COM-8** should be adopted.

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VI. TID'S BRIEF FUNDAMENTALLY MISINTERPRETS THE COMMISSION'S RESPONSIBILITY UNDER CEQA TO EVALUATE THE IMPACT OF AGRICULTURAL LAND CONVERSION.

In its Opening Brief, TID reiterates the arguments made at hearing that the Commission is precluded from evaluating the issue of whether the conversion of prime farmland caused by the project is a significant impact, and from imposing feasible mitigation for any such impacts. (TID Opening Brief, p. 26) TID claims that the project meets the requirements established in Section 15183 of Title 14 of the California Code of Regulations for an exemption from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.).

Staff has not disputed those claims, but has pointed out that case law indicates that Lead Agencies must affirmatively elect to use these provisions. (Staff Opening Brief, p. 12, citing *Gentry v. City of Murrieta* ((1995) 36 Cal.App.4th 1359, 43 Cal.Rptr. 2d 170, hereinafter *Gentry*) Staff noted that the Commission has provided *no* notice to any entity that it intended to circumscribe its environmental review pursuant to that section of the CEQA Guidelines.

TID attempts to evade this point by claiming that *TID* provided this notice by raising this issue, including making oral argument on this issue at hearing. (TID Opening Brief, p. 29) To paraphrase TID's own statement about staff, TID is *not* the Commission. Its statements almost one year into the licensing process that it would like the Commission to rely on this section are not sufficient to meet the requirement that the Commission itself elect to do so. TID also claims that *Gentry* contains no requirement that the prior EIR be identified as a relevant document in a public notice or request for comments. What the *Gentry* court said is:

> Again, however, it does not appear that either the County or the City actually proceeded pursuant to section 21083.3. Respondents do not cite any reference to section 21083.3 in the administrative record and our review of the record has not revealed any." Gentry v. City of Murrieta, ((1995) 36 Cal.App.4th, 1359,1407, 43 Cal.Rptr.2d 170, 203)

There can be no dispute that to date, the Commission has not "actually proceeded pursuant to section 21083.3." And, as discussed in our Opening Brief, we do not recommend that the Committee do so now. Rather than reiterate our statements about the lack of complete review in the prior EIR, staff urges the Committee to review the documents for itself. We are confident that such a review will clearly demonstrate that these documents lack any discussion of mitigation measures, including those recommended by the Department of Conservation and the Department of Food and Agriculture

In addition, TID completely fails to address the question of whether a Section 21083.3 exemption can be used to avoid the necessity of the Commission making its own determination about the appropriateness of an override. This is a question not addressed in the statute itself. As the analysis in our Opening Brief demonstrates, the legislative history indicates that it would be wrong to read into Section 21083.3 an abrogation of the Commission's responsibility to evaluate impacts identified in a previous EIR, but not mitigated. (Staff Opening brief, p. 15) This conclusion is consistent with the legislative history of the bill, with the general principles of CEQA, and with the language in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 126 Cal.Rptr.2d 441).

All three authorities demonstrate that fundamental principles of public accountability require the Commission to publicly debate whether a project's significant adverse impacts can be mitigated, and if they cannot, whether those impacts are outweighed by other considerations. When that principle is applied to this case, it can be clearly seen that the impacts caused by the loss of prime agricultural land *can* be mitigated, and the question of an override is never reached. Staff, the Department of Food and Agriculture, and the Department of Conservation have identified the conversion of prime agricultural land as a significant impact and identified easements or trusts as a measure that can be effectively used to mitigate that impact. When the Committee examines this issue carefully, we are confident that it will conclude that the impacts associated

with the conversion of agricultural land can be mitigated to an insignificant level by the measures identified by staff in **LAND-6**.

VII. THE CONVERSION OF 18 ACRES OF PRIME AGRICULTURAL LAND IS A SIGNIFICANT ADVERSE IMPACT AND THE COMMISSION SHOULD REQUIRE MITIGATION.

TID also argues that, if the Commission does evaluate the effect of agricultural land conversion, the small amount of acreage converted renders the effect insignificant. (TID Opening Brief, p. 19) TID references the fact that 18 acres is less than .0064 percent of "important" farmland within the County. (*Ibid*.) As discussed in our Opening Brief, a ratio theory is disfavored by courts interpreting CEQA and should be treated by the Commission with great caution. (Staff Opening Brief, p.17) TID also claims that staff has not offered a "shred" of evidence to explain why the conversion caused by this project is significant. Staff disagrees. We believe that the recommendation of the Department of Conservation – charged by statute with protecting the state's farmland resources -- constitutes more than a "shred" of evidence. In fact, such a recommendation constitutes substantial evidence that supports a conclusion that the conversion is significant and should be mitigated.

The Department of Conservation's recommendation is based on a review of the specific facts of this project and includes a conclusion that, "[u]nless the mitigation measures from the general plan or zoning projects reduce the agricultural conversion impacts to less than significant, the Division [of Land Resources Protection] recommends that the 18-acre conversion be identified as a significant impact. The conversion should also be identified as a contributing factor to the cumulative impact of agricultural land conversion in Stanislaus County." (Letter of Erik Vink, Assistant Director, Department of Conservation to Bob Eller, Commission staff, dated September 2, 2003) TID's discussion of this issue ignores the Department's analysis and its conclusion.

Finally, TID cites the Commission decision in the Metcalf proceeding (99-AFC-3) as support for its conclusion that the conversion of prime farmland in this case is insignificant. To the extent that TID interprets the Metcalf decision to mean that the conversion of 20 acres of farmland (or a lesser amount) can *never* be significant, or that farmland conversion is never significant because other development on the site will occur, staff disagrees. Just because the Commission concludes that the conversion of 20 acres is insignificant in one case should not necessarily mean that it must reach an identical conclusion in every other case involving the conversion of 20 (or 18) acres. Such an approach ignores the Commission's responsibility to consider the specific facts of each case (such as the analysis of the Department of Conservation in this case).

In addition, the fact that an impact may be inevitable does not mean that it is insignificant. There is no basis in CEQA for claiming that just because an impact will occur regardless of whether it is approved as a part of one project or another, a Lead Agency can therefore deem the impact insignificant. Thus, in this case, the fact that someone else other than TID may develop the 18 acres does not render an otherwise significant impact insignificant.

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CONCLUSION

Staff believes that a careful review of the factual and legal issues that remain in dispute in this case will demonstrate that staff's Conditions of Certification are appropriate. These remaining issues are important and should be resolved by adopting staff's proposed **AQ-C6**, **AQ-C8**, **COM-8**, and **LAND-6**. Doing so will result in a decision that adequately mitigates all identified significant adverse impacts to a level of insignificance and ensures that the project will comply with all applicable laws.

Date: November 14, 2003

Respectfully submitted,

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